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Serial Number 10/735,412
Docket Number YOR920030348US1
Amendment1**REMARKS**

Claims 1-29 remain in the application. Claims 1, 11, 18, 28, 29 have been amended. Applicant respectfully requests reconsideration in light of the amendments and the following remarks.

CLAIM REJECTIONS UNDER 35 USC §112

The Office Action rejected claims 28-29 for lack of proper antecedent basis under 35 USC 112. Claims 28-29 have been amended to recite the limitations of independent claim 23, not claim 11.

CLAIM REJECTIONS UNDER 35 USC §102

The Office Action rejected claims 1-3, 9 and 18-20 under 35 USC 102(e) as being anticipated by Liberty et al. (US 2005/0060619). For a reference to anticipate a claim, each element and limitation of the claim must be found in the reference. Hoover Group, Inc. v. Custom Metalcraft, Inc., 66 F.3d 299, 302 (Fed. Cir. 1995).

As to claim 1, Liberty neither teaches nor suggests the claimed plurality of processors. Liberty also fails to teach or suggest a local counter associated with each of the processors and an event register associated with each of the local counters. Liberty does not teach or suggest an event logger. The Office Action contends that the claimed event logger corresponds to the processor 4. However, the Office Action also contends that the claimed

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processors correspond to this element. Logically that is not possible.

Claims 2-3 are dependent on claim 1 and are not anticipated by Liberty for at least the foregoing reasons.

Claims 9 is not anticipated by Liberty because Liberty neither teaches nor suggests the event register which comprises an error time stamp register that receives a value from the local counter when an event occurs.

Claim 18 is not anticipated by Liberty because Liberty neither teaches nor suggests a plurality of processors. Liberty also fails to teach or suggest local counters, each associated with a processor. Liberty only shows a single processor.

Claims 19 and 20 are dependent on claim 18 and are not anticipated by Liberty for at least the same reasons that claim 18 is not anticipated by Liberty.

CLAIM REJECTIONS UNDER 35 USC §103

The Office Action rejected claims 4, 11, and 23 under 35 USC 103(a) as being unpatentable over Liberty et al. in further view of Coyle et al. (US 6,546,507). The Office Action admits that Liberty does not teach the event register which remains frozen until the event register is read by the system monitor. However, the Office Action contends that Coyle teaches the limitations of claim 4 at fig. 6, items 620 (FFM Logic) and 624 (Processor/service) and col. 14, lines 49-56. The Office Action combined its interpretation of the teachings of Liberty and Coyle based on the alleged motivation that "it would provide a first failure capture mechanism

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that captures the operating information, which is useful to isolate a transient error.” If that were the case, then Coyle would have been motivated to modify his own invention to achieve this *useful* result. However, Coyle did not (or we would be arguing over anticipation). In fact, Coyle represents a failure of others which is objective evidence of non-obviousness that must be considered. *In re Dow Chemical Co.*, 837 F.2d 887 (Fed. Cir. 1988).

As to claim 11, the Office Action concedes that Liberty does not teach a method that includes freezing the local counter for a processor when a critical event associated with the processor occurs. However, using the same alleged motivation, the Office Action contends that Coyle teaches not only the above-referenced limitation but also motivates the combination. As mentioned above if the motivation used by the Office Action were proper then that establishes a longstanding problem or need that until applicant’s invention was not solved and the prior failure of others. See *Intel v. US International Trade Commission*, 946 F.2d 821 (Fed. Cir. 1991).

Claim 23 is a manufacture counterpart of claim 11. The invention of claim 23 is not unpatentable for the reasons discussed with respect to claim 11. Therefore, the rejection should be withdrawn.

The Office Action rejected claims 5-6 and 10 under 35 USC 103(a) as being unpatentable over Liberty et al. in further view of Touboul (US 6,125,390). As to claim 5, the Office Action concedes that Liberty does not teach the network of claim 1 comprising dynamic masking mechanisms for filtering the event register outputs to differentiate between critical and non-critical events. However, the Office Action contends that Touboul teaches the referenced limitation and that it would have been obvious to modify Liberty by adding the Touboul system.

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The alleged motivation is that "it would allows [sic, allow] the administrator to schedule procedures which automatically initiate housekeeping tasks" Citing col. 4, lines 17-30.

The system according to the present invention allows the administrator to schedule procedures which automatically initiate housekeeping tasks required to ensure that programs continuously run smoothly. The system retains information for preemptive analysis of the network programs problems, which can be used to prevent problem reoccurrences. This information can also be used to maintain the network by designating scheduling procedures which perform necessary actions on the workstations to ensure its safe operation and by designating correction procedures which react to the appearance of smaller problems to prevent the occurrence of bigger problems. The system according to the present invention also manages its own scheduled procedures, guaranteeing successful completion for the maintenance and backup tasks.

As can be ascertained by the above, there is no motivation to combine Touboul with Liberty. Liberty relates to using hardware timestamps to determine a global ordering of events. See Liberty, paragraph [0001]. By contrast Touboul relates to a method and apparatus which automatically detects and corrects error conditions in programs in programs running on network workstations. Those seeking solutions to one program would not look to prior art concerned with a different problem. If they did as the Office Action contends then we are faced with a situation where applicant's invention solved a problem that existed and was not solved. As discussed above, that is actually objective evidence of nonobviousness and the Office Action must by its own admission withdraw the rejection. Moreover, even if the selective combination of elements used by the Office Action were done, that combination would not differentiate between critical and non-critical events.

With respect to claim 6, the Office Action admits that Liberty does not teach the network of claim 5 wherein the masking is dynamically updated during online processing. However, the Office Action contends that Touboul teaches the above limitation. The section

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cited by the Office Action discusses events to be reported. Claim 6 relates to the used of dynamic masking mechanisms for filtering the event register outputs. As discussed above, Liberty teaches error registers which are not the same as event registers. Claim 6 relates to dynamically updating the masking. The combination of Liberty and Touboul would not produce an apparatus for dynamically updating the masking. Moreover, if the Office Action persists in its use of the motivation cited then it must concede the non-obviousness of the claimed invention as discussed above.

With respect to claim Office Action this paper has established that the combination of Liberty and Touboul does not teach or suggest an event register as claimed. Therefore, a fortiori the combination of references does not teach or suggest the event register storing an error occurred that indicates that a critical event has occurred.

The Office Action rejected claims 7-8 under 35 USC 103(a) as being unpatentable over Liberty et al. in further view of Haas et al. (US 2003/0005149). With respect to claim 7 the Office Action admits that Liberty does not teach network of claim 1 comprising software for performing conditional probability calculations based on event information stored in a history table wherein the calculations are performed to determine if a probability of an event occurring has exceeded a minimum threshold level and, if the threshold is exceeded, to migrate a process or schedule maintenance to avoid consequences of the predicted event.

The Office Action cites paragraph [0032] of Haas that does not discuss performing conditional probability calculations and neither mitigates a process nor schedule maintenance. Instead, Haas determines the correlation of the failure times of two edges sharing a common

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node. Moreover, there is no evidence of any suggestion, teaching or motivation to combine Haas with Liberty. Haas relates to a routing protocol. The motivation relied upon by the Office Action is too broad. The reason for combining references must be specific. The showing of a reason to combine references must be clear and particular. *In re Dembiczak*, 175 F.3d 994 (Fed. Cir. 1999).

With respect to claim 8, the Office Action admits that Liberty does not teach the network of claim 7 wherein the conditional probability calculations are based upon events occurring within a selected time window. However, the Office Action contends that Haas teaches the independent-tree ad hoc routing where probability analysis for the total time for which the set of trees last. Even though the words "probabilistic analysis" appear in the Haas patent, the claims call for probabilistic calculations and there is no further similarity between the claimed invention and the cited references. The claimed subject matter requires that the conditional probability calculations be based upon events occurring within a selected time window. There is no evidence of this limitation in the cited references.

The Office Action rejected claims 12-15, 21-22, and 24-26 under 35 USC 103(a) as being unpatentable over Liberty et al. in further view of Coyle et al. (US 6,546,507), in further view of Lenny et al. (US 6,600,614).

With respect to claim 12, the Office Action concedes that Liberty and Coyle do not teach the method of claim 11 comprising establishing a history table containing information concerning events associated with the critical event and the conditional probabilities of the associated events during offline processing. However, the Office Action contends that Lenny

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teaches the above-referenced limitations. A piecemeal reconstruction of the prior art patents in light of the applicant's disclosure shall not be the basis for a holding of obviousness. *In re Kamm*, 172 USPQ 298 (CCPA 1972). Thus, it is impermissible within the framework of section 103 to pick and choose from any one reference only so much as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one of ordinary skill in the art. *Kamm*, 172 USPQ at 302. Here, the Examiner has canvassed the prior art using applicant's own claims as a roadmap. That is not permissible. The case law makes clear that the best defense against hindsight-based obviousness analysis is the rigorous application of the requirement for a showing of a teaching or motivation to combine the prior art references. See *Dembiczak*, 175 F.3d at 999, 50 USPQ2d at 1617. "Combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability--the essence of hindsight." *Id.* *Ecolchem v. Southern California Edison*, 227 F.3d 1361 (Fed.Cir. 2000), *cert. den.*, 121 S.Ct. 1607 (Fed. Cir. 2000).

The motivation cited by the Examiner for piecing together the three cited patents is that "it would prevent loss of time or data due to failure." The Office Action cites col. 5, lines 60-63 which discusses a specific way to predict loss of data due to a disk drive failure. Neither Liberty nor Coyle deal with disk drive failures. The only motivation apparent for making the combination is applicant's claims 12-15, 21-22, and 24-26 and that is improper hindsight.

The Office Action rejected claims 16 and 28 under 35 USC 103(a) as being

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unpatentable over Liberty et al. in further view of Coyle et al. and in further view of Touboul (US 6,125,390). In these rejections the Examiner used the same motivation as used in the rejection of claim 5. However, that was for the combination of Liberty and Touboul. The motivation for combining Liberty and Touboul was inappropriate for the reasons discussed herein.

In addition, the Examiner offers no additional reasons why that motivation is also adequate for the combination of Liberty, Coyle and Touboul and there is none. The alleged motivation is so broad that if it were allowed it would amount to a license to combine from which no invention in this area could escape, regardless of its merits. That cannot be a proper basis for a conclusion of obviousness. Fortunately the law has a safeguard against such impermissibly broad, open ended motivations and that is the requirement that such motivations be specific. A general incentive does not make obvious a specific result. *In re Deuel*, 51 F.3d 894 (Fed. Cir. 1995).

The Office Action rejected claims 17 and 29 under 35 USC 103(a) as being unpatentable over Liberty et al. in further view of Coyle et al. and in further view of Touboul, and in further view of Ramamurthi (US 5,251,144). Not finding the inventions of these claims in the combination of Liberty, Coyle, and Touboul, the Office Action now makes the combination of four patents. The patent statute requires that all claims be considered as a whole when determining obviousness. The Office Action cites the motivation used in the rejection of claim 12 for making the combination of an amazing number of four references. The motivation used for rejecting claim 12 was that "it would prevent the loss of time or data due to failure." Again,

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that is a very general motivation that would justify a very large number of combinations but as discussed above, the law provides safeguards against using such universally-applicable reasons for combining references. One consequence of using such motivations is that the failure of any one reference to provide a solution for such problems is itself evidence that the combination would not have been obvious. Therefore, the rejections should be withdrawn.

The Office Action rejected claim 27 under 35 USC 103(a) as being unpatentable over Liberty et al. in further view of Coyle et al., in further view of Lenny et al., in further view of Haas et al. (US 2003/0005149). This rejection uses the same motivation as used in claim 12 to combine four references: Liberty; Lenny; Coyle; and Haas. That motivations was that "it would prevent loss of time or data due to failure." This motivation suffers from the defect discussed above and is therefore improper.

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For the foregoing reasons, Applicant respectfully requests allowance of the pending claims.

Respectfully submitted,



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Certificate of Facsimile Transmission

I hereby certify that this Amendment and Response to Office Action, and any documents referred to as attached therein are being facsimile transmitted on this date, **January 3, 2007**, to fax number 571 273-8300.



Michael J. Buchenhorner

Date: January 3, 2007